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In the Supreme Court of the

United States

October Term, 1970

No. 605

ALAN RANDALL GREEN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit.

Petition For Rehearing

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For Petitioner

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Petition for Rehearing.

This Petition for Rehearing is respectfully sought after denial of certiorari on November 16, 1970, and is confined to circumstances which have intervened since the filing of the Reply Brief herein, which circumstances

are of substantial effect, to wit, oral argument on October 22, 1970 and this Court's forthcoming decision to be announced in Dutton v. Evans, No. 104, October Term, 1970. Rule 58, 28 U.S.C., U.S.Sup.Ct.

QUESTIONS PRESENTED ON REHEARING

This petition for rehearing is restricted to the following questions:

1. Without evidence aliunde of the continuance of a conspiracy, does the presumption of its continuance shift the burden of proof to the defendant and compel him to testify in violation of his 5th Amendment privilege against self-incrimination?

2. Whether, in a conspiracy prosecution, prosecutorial use of statements of a non-testifying co-conspirator made outside the United States violate the confrontation clause of the 6th Amendment and the due process clause of the 5th Amendment where the declarant is not; and

never was, subject to compulsory process under the 6th Amendment?

The presumption of a continuing conspiracy shifts the burden of proof to the defendant compelling his testimony in violation of the 5th Amendment.

The presumption of the existance of a conspiracy which continues unless or until there is evidence aliunde of its termination, is squarely in conflict with the presumption of innocence. The former presumption effectually compels an accused to take the stand and explain when and if there was in fact a termination of the conspiracy. This places him in a position where he must testify to the highly incriminating fact of knowledge of the prior existence of the conspiracy (or to assume its existence) and implicate himself with participation therein.

In the case at bench, because of the confusion caused by the existence of

the presumption, the trial court permitted the government to adduce before the jury highly prejudicial evidence of events which transpired after the alleged conspiracy had terminated.

Viewing the evidence in the light most favorable to sustain the conviction, a conspiracy was entered into in the District of Nevada with its object being to smuggle marihuana into the United States from Mexico by air. (C.T. 3-6) Petitioner was present during the early discussions concerning the rental of the aircraft. (R.T. 672) He had no financial interest in the venture. Transporting the contraband by airplane into the United States from Mexico, co-conspirators Bates and Smith were arrested at a landing strip at Parker Lake in the State and District of Arizona. At that time and place, the entire load of marihuana was seized by customs agents. (R.T. 337) Bates and Smith were arraigned before the commissioner in the District of Arizona

and the contraband was transported in the airplane under the control of customs agents from the State and District of Arizona to Las Vegas Airport in the State and District of Nevada, the district wherein petitioner's trial was had. (R.T. 53; 59; 337) At the Las Vegas Airport, one of the arrested co-defendants was ordered to call petitioner on the telephone in order to arrange for a ride from the airport where the airplane containing the cargo of marihuana in custodia legis had been landed. (R.T. 662) The arrested co-defendant and another charged defendant began unloading the cargo, untouched by petitioner, when an awaiting government agent drove to the vicinity of the aircraft in the "Follow Me" truck and placed petitioner under arrest. (R.T. 663)

But for the confusion surrounding the presumption of the continuance of the alleged conspiracy, the trial court could not have allowed the jury to hear the highly

prejudicial evidence regarding the contraband in the presence of petitioner and its physical presence in the District of Nevada after it had been seized by the government in the District of Arizona.

This court has recently found a long-standing irrational presumption unconstitutional. See Leary v. United States, 395 U.S. 5 (1960) wherein the court held it was irrational and therefore unconstitutional to presume knowledge of illegal importation of marihuana from mere possession.

Because there is no rational connection between the fact proved and the ultimate fact, it interjects caprice into the trial by directing the trier of fact to treat something as true which might well be contrary to the facts. It conflicts with the reasonable doubt standard. The Leary presumption, together with its concomitant instruction, directed a conviction in situations where the government had failed to prove the corpus delicti of

the offense charged. The continuing-conspiracy presumption is tantamount to directing a conviction for the crime of another.

When a conspiracy, once established, is presumed to continue, the jury is directed to hold the accused responsible for the acts of all the co-conspirators during its continued existence, unless he explains his disassociation to their satisfaction. To do this, he must implicate himself in prior membership.

This is in conflict with this court's ruling in Griffin v. California, 380 U.S. 609 (1965) and Mallov v. Hogan, 378 U.S. 1 (1964), being violative of a defendant's privilege against self-incrimination.

Evidence-wise, the presumption is a prosecutor's clincher for guilt.

In accord with the presumption of innocence and the privilege against self-incrimination, proof of the continuance of a conspiracy should be accomplished only with evidence independent of the presumption.

Under this court's holding to be announced in Dutton v. Evans, supra, the prosecutorial use of implicating declarations of a non-available co-conspirator, made outside the United States, violates the confrontation clause of the 6th Amendment.

Petitioner does not wish to appear presumptious as to what this court's holding will be when Dutton v. Evans (supra) is announced. If petitioner's position is in accord with the forthcoming opinion, it is requested that he get the benefit of being before the court when it is announced. The time for filing this petition terminates December 11, 1970. If petitioner's position is not in accord with Dutton v. Evans, supra, of course, a summary denial herein is in order.

In petitioner's trial, informant Smith was the major government witness. He testified and was examined at length about conversations in furtherance of

the conspiracy, the conversations having taken place in Mexico with one "Manuel" who was Smith's "connection".

On one occasion, alleged co-conspirator Pappas was present in Mexico and the subject matter of the conversations was the negotiation, bargaining and contracting for the purchase of the contraband. Another separate occasion was when alleged co-conspirator Bates was present in Mexico and the subject matter of the conversations was payment and credit arrangements whereby Smith was able to obtain the "full load" of marihuana on partial consignment due to Smith's previous dealing with Manuel. Smith was the only witness who had prior acquaintance with Manuel. His convenient memory did not include Manuel's surname. Bates and Pappas spoke only English and did not speak or understand Spanish. Manual was a resident of Culiacan, Mexico. He understood and spoke only Spanish and had no knowledge of English. The only party to

all of the conversations with Manuel who could speak both English and Spanish was government informant Smith who testified that he acted as interpreter.

The speculation of what was lost or misinterpreted in the translation is a challenge to the imagination.

The impact of these conversations necessarily was damaging upon the jury which was charged to determine the validity of the highly technical defense of entrapment.

Residing in Mexico, Manuel was not subject to compulsory process as required by the 6th Amendment and could not be confronted and cross-examined as to these alleged conversations.

In comparing petitioner's factual situation with the facts in Dutton v. Evans, supra, Smith's testimony to the voluminous declarations made by Manuel on the various occasions was much more damaging and prejudicial than the single

statement made on one occasion attributable to Williams by prosecution witness Shaw. Neither Manuel (the declarant in petitioner's case) nor Williams (the declarant in Dutton v. Evans) was before the court and subject to confrontation and cross-examination. Williams was subject to the compulsory process of the court for whatever such might be worth. Manuel was beyond the jurisdiction of subpoena.

Confrontation and cross-examination of Smith cannot cure the lack of confrontation of Manuel. Evans v. Dutton, 400 F.2d 826 (5th Cir., 1968). As Cowin, J., stated therein at page 830:

> "A criminal defendant cannot, consistent with the confrontation clause, be convicted upon the testimony of phantom witnesses whose credibility is unknown and unknowable by the trier of fact."

Petitioner submits that this reasoning is consonant with the

rationale of the confrontation clause of the 6th Amendment and that it will be restated and adopted by this court in the announcement of its decision in Dutton v. Evans.

CONCLUSION

This petition is restricted to the grounds herein specified and it is submitted that rehearing should be granted in light of the court's opinion forthcoming in Dutton v. Evans, supra,*/

Dated: December 4, 1970

Respectfully submitted,

Edward L. Cragen
For Petitioner.

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*/ There should be no concurrent-sentence-mootness doctrine problem herein. Cf. Hirabayashi v. United States, 320 U.S. 105 (1943) and Benton v. Maryland, 395 U.S. 784 (1968). In that substantive count 2 was based upon the transportation of the marihuana within the District of Nevada and that its presence in the District of Nevada was solely due to the positive acts of the government in removing the contraband from the District of Arizona after it was in custodia legis, petitioner's conviction and concurrent sentence thereon was clearly erroneous. See comment of the trial judge in

acquitting petitioner of Count 3 of the indictment, the remaining count charged:

"THE COURT (to the prosecuting attorney): That is where you and I part company, because the transportation from Parker Field, Arizona, to Las Vegas, Nevada, was under compulsion; there was a complete hiatus in the causation, and the transportation, that portion of the transportation was caused by the Government agents." (R.T. 514)

And,

"THE COURT: * * * the defendants alone, jointly or in conspiracy, did not cause the transportation of the marihuana from Parker Lake, Arizona, to Las Vegas, Nevada." (R.T. 517)

CERTIFICATE OF COUNSEL

Edward I. Cragen, hereby certifies that he is the attorney for petitioner herein and that he is an active member of the bar of the United States Supreme Court. He has prepared and read the foregoing petition for rehearing and in his opinion the same is well founded in Law and proper to be filed herein. The petition is brought in good faith and is not presented for purposes of delay or vexation.

Dated: December 4, 1970

Edward I. Cragen
For Petitioner